

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 SETH D. HARRIS, Acting )  
4 Secretary of Labor, United )  
5 States Department of Labor, )

6 Plaintiff, ) No. 3:13-cv-728-HZ

7 vs. ) May 15, 2013

8 OAK GROVE CINEMAS, INC., an ) Portland, Oregon  
9 Oregon domestic business )  
10 corporation; BARRINGTON )  
11 MANAGEMENT, LLC, an Oregon )  
12 domestic limited liability )  
13 company; BARRINGTON VENTURE, )  
14 LLC, an Oregon domestic )  
15 limited liability company; and )  
16 DAVID EMAMI, an individual and )  
17 in his official capacity, )

18 Defendants. )

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20 **HEARING ON MOTION FOR PRELIMINARY INJUNCTION**

21 TRANSCRIPT OF PROCEEDINGS

22 BEFORE THE HONORABLE MARCO A. HERNANDEZ

23 UNITED STATES DISTRICT COURT JUDGE  
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## APPEARANCES

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1 P R O C E E D I N G S

2 THE CLERK: Your Honor, we're here today on the  
3 case of Harris versus Oak Grove Cinemas, et al., Civil  
4 Case 3:13-CV-00728-HU, on a motion for preliminary  
5 injunction, Docket No. 3.

6 Counsel, please state your appearances for the  
7 record.

8 MR. BROWN: Good morning, Your Honor, Bruce Brown  
9 and Susan Brinkerhoff for the Secretary. With us at  
10 counsel table is Julieanna Elegant, who is the wage and  
11 hour investigator.

12 THE COURT: Thank you.

13 MR. HARNDEN: Ed Harnden for defendant, along  
14 with Richard Hunt and Banu Ramachandran.

15 THE COURT: Thank you.

16 So you're the plaintiffs in this case, and you're  
17 asking me to issue a preliminary injunction, which means  
18 that you would have the burden of proof, which also means  
19 you get to go first. What do you want to tell me?

20 MR. BROWN: Well, thank you, Your Honor. Let me  
21 start by saying that I'm going to address a few of the  
22 more general legal issues that counsel raised, if it's  
23 acceptable to the Court, and Ms. Brinkerhoff will address  
24 the more specific issues relating to the test that we  
25 have to meet for a preliminary injunction.

1           We're also prepared to present additional factual  
2 evidence if the Court is inclined to hear Ms. Elegant's  
3 testimony. There's been a lot of talk about the  
4 tape-recording. If the Court wants to hear the  
5 tape-recording, we're prepared to play that for the  
6 Court.

7           I'd like to start by just addressing a couple of  
8 the general issues that they raised. I think they're  
9 kind of peripheral, but we can, I hope, not spend a lot  
10 of time on them by addressing them quickly and just kind  
11 of getting them out of the way.

12           THE COURT: Sure.

13           MR. BROWN: Thank you, Your Honor.

14           Is it okay if I talk from here or do you want me  
15 at the podium?

16           THE COURT: You're fine.

17           MR. BROWN: Thank you.

18           First I wanted to just briefly address the First  
19 Amendment issue that counsel raised in response to some  
20 of the specific remedies that were put into the TRO that  
21 we asked for in our preliminary injunction. And I would  
22 just note that their entire argument on the First  
23 Amendment issue is really based on either a misreading or  
24 a mischaracterization of the recent NLRB case out of the  
25 D.C. Circuit. That case is *National Association of*

1     *Manufacturers v. NLRB*, 2013 Westlaw 1876234. They  
2     characterize the case in their briefing and their  
3     argument to the Court as "The District of Columbia  
4     Circuit recently vacated, on First Amendment grounds, a  
5     National Labor Relations Board rule."

6             And if Your Honor has had an opportunity to read  
7     the case, you'll know that that's simply a  
8     mischaracterization. The case was not decided on the  
9     First Amendment grounds at all. It was decided on the  
10    Court's determination that the rule that was under  
11    review, that the NRLB promulgated, was in conflict with  
12    another section of the National Labor Relations Act. The  
13    first holding is that the posting requirement, which was  
14    at the heart of the dispute, in the Court's opinion they  
15    concluded that the Board's rule violates Section 8(c) of  
16    of the NLRA. All of the discussion about the First  
17    Amendment is really peripheral to the holding to the  
18    case, which is that it violated a section of the National  
19    Labor Relations Act. It's not a First Amendment case at  
20    all.

21            None of the cases cited either in the *National*  
22    *Association of Manufacturers* decision or in respondent's  
23    brief, none of the cases are in the same situation that  
24    we are here, evidence of a violation of an Act, and we're  
25    asking the Court to fashion a remedy to prevent

1 additional violations. It's not a rule-making matter.  
2 It's not a case affecting 6 million employers as the NLRB  
3 case was.

4 The other -- the second issue I'd like to just  
5 briefly address, which I think is another kind of  
6 distracting issue in respondent's briefing, is this issue  
7 about whether or not the tape-recording was taken in  
8 violation of Oregon state law. And, quite simply, it  
9 doesn't matter, and I was a little surprised when I read  
10 the argument.

11 Counsel is aware that there is a federal statute  
12 that governs admissibility of evidence in federal  
13 proceedings, and the federal statute makes a  
14 tape-recording admissible as long as one party to the --  
15 if the person taping it was a party to the conversation.  
16 The case law is all clear that if it's admissible under  
17 the federal statute, it doesn't matter whether it  
18 violated a state law or not.

19 And I'll just refer the Court to one case,  
20 *Roberts v. Americable International*, A-m-e-r-i-c-a-b-l-e,  
21 883 F.Supp. 499, where the Court, in rejecting the motion  
22 to suppress because the tape-recording in that case  
23 clearly violated -- taking a tape-recording clearly  
24 violated California's privacy act, in denying the motion  
25 to suppress, the Court noted the Ninth Circuit has

1 consistently held that recordings of conversations are  
2 admissible in federal court proceedings when obtained in  
3 conformance with federal law, without regard to state  
4 law. Similarly, it's a red herring issue about how this  
5 recording was made and whether it was made in violation  
6 of Oregon law or not.

7 The other issue I'd just like to briefly address  
8 is most of the discussion in the response brief was about  
9 the TRO, the procedure for how the TRO came about. If  
10 the Court is interested in hearing some of what we  
11 believe are the factual inconsistencies and inaccuracies,  
12 we can address those. But really I think at this point,  
13 what does it matter, right?

14 We're going to present evidence and argument, and  
15 you're going to decide whether or not we have met the  
16 standard for preliminary injunction. If you agree with  
17 us that an injunction is warranted, then the TRO is  
18 effectively dissolved because you're going to replace it  
19 with a preliminary injunction. If you disagree with us  
20 and don't think we've met the burden, then the TRO will  
21 be dissolved. So it doesn't seem to be a good use of the  
22 Court's time to spend a lot of time talking about how the  
23 TRO itself came about as an issue.

24 Would the Court like to hear testimony or would  
25 you prefer legal argument?

1 THE COURT: Well, let me tell you one of the  
2 things that is tugging at me, and one is that the  
3 tape-recording, as I recall, was taken back in September,  
4 and then something occurred in April where the  
5 allegations are that workers were being threatened with  
6 physical harm as well as other forms of retaliation.

7 And so we're in May, and there is a question in  
8 my mind as to why it took so long for you to get in here  
9 if there is such urgency to what you are saying has  
10 happened.

11 MS. BRINKERHOFF: We -- we did know about the  
12 tape-recordings for some time, and we didn't like them  
13 when we heard about them then. But it really wasn't  
14 until we heard about the physical harm sometime after  
15 April 9th that we realized that we probably needed to  
16 step forward and seek an injunction. And we -- the  
17 process began within the government as soon as we found  
18 out about the physical harm threat.

19 THE COURT: It just takes the government a month  
20 to put together a request for a temporary restraining  
21 order?

22 MS. BRINKERHOFF: It was less than a month. I  
23 think we filed our -- I believe the physical threat was  
24 around April 9th, that conversation, and I believe we  
25 filed our motion on April -- or May 1st or 2nd.



1 THE COURT: Okay. Three weeks.

2 MS. BRINKERHOFF: So three weeks.

3 THE COURT: Okay. That explains it. I was just  
4 curious. I was used to state court: Something happens  
5 on Monday, and they're in court by Tuesday.

6 MS. BRINKERHOFF: But that we could work so fast.

7 THE COURT: So did you communicate with the other  
8 side and say, "We have a problem. This is what the  
9 problem is," and describe to them in detail what the  
10 problem was?

11 MS. BRINKERHOFF: We described that we were in  
12 possession of a recording that contained threats of  
13 retaliation against employees.

14 THE COURT: What about the issue that occurred on  
15 April the 9th?

16 MS. BRINKERHOFF: The physical harm? I don't  
17 recall having a conversation about that threat.

18 THE COURT: Why?

19 MS. BRINKERHOFF: Well, because by that time we  
20 had decided that we were going to file the motion for the  
21 TRO and the preliminary injunction. We did as soon  
22 as --

23 THE COURT: Well, let me interrupt you. If you  
24 are worried that workers might get harmed and you have  
25 access to their lawyer, why aren't you on the phone

Elegant - D

1 saying, "Hey, your guy or your defendants or your clients  
2 are threatening physical harm. You need to talk to them  
3 about that. That's a huge problem for us," right?

4 MS. BRINKERHOFF: Yes.

5 THE COURT: So why didn't that conversation  
6 occur?

7 MS. BRINKERHOFF: Frankly, probably because we  
8 were so caught up in drafting the motion.

9 THE COURT: Okay. What else do you want to tell  
10 me?

11 MS. BRINKERHOFF: Would you like to hear  
12 Ms. Elegant's testimony?

13 THE COURT: Sure. She can come up and take the  
14 stand.

15 THE CLERK: You can step around to the stairway.  
16 Remain standing. Raise your right hand, please.

17  
18 JULIEANNA ELEGANT

19 called as a witness in behalf of the Plaintiff, having  
20 been first duly sworn, is examined and testifies as  
21 follows:

22

23 THE CLERK: Please be seated. Please state your  
24 name for the record and spell both your first and last  
25 names.

Elegant - D

1 THE WITNESS: My name is Julieanna Elegant,  
2 J-u-l-i-e-a-n-n-a, no space, and the last name is  
3 Elegant, E-l-e-g-a-n-t.

4 THE COURT: You're probably better off  
5 questioning her from behind your table over there because  
6 the microphone is going to be better able to pick you up.  
7 If you need to move around for any reason, hand papers,  
8 things like that, please feel free to do so. But for  
9 purposes of our record, it helps our court reporter if  
10 you're right behind a microphone.

11 MS. BRINKERHOFF: Okay. I will do that.

12  
13 DIRECT EXAMINATION

14 BY MS. BRINKERHOFF:

15 Q. Ms. Elegant, would you briefly summarize your  
16 education for the Court?

17 A. I have a bachelor's degree in history, I have a  
18 master's degree in international development, and I have  
19 a law degree.

20 Q. And how are you presently employed?

21 A. I currently work for the U.S. Department of Labor,  
22 with the Wage and Hour Division. I'm an investigator.

23 Q. Would you briefly summarize your duties as a wage and  
24 hour investigator?

25 A. So I am -- my supervisors will determine which cases

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1 are given to me. Once a case is given to me, I either  
2 send a letter or draft a letter which talks about the  
3 investigative process. Sometimes we do drop-ins.  
4 Sometimes we send that letter ahead of time.

5 Then we -- with the letter, we will initiate the  
6 investigation. The letter will detail what occurs in an  
7 investigation. So usually we have an initial conference  
8 with a managing or a member of the company or owner,  
9 where we get additional information, explain the process.  
10 We do a tour of an establishment. We will look at  
11 records like payroll and time records. We'll interview  
12 employees, both on site and off, both present and past.

13 And then that usually takes anywhere from a few  
14 weeks to a few months, depending on a lot of variables.  
15 And we will have a final conference to talk about the  
16 findings, make sure that the owner is or the manager is  
17 in compliance; and if any back wages are owed, we'll  
18 present them at that time.

19 Q. And is the owner at the final conference?

20 A. Usually the owner is at the final conference, yes.

21 Q. In your role as a wage and hour investigator, have  
22 you been involved in the investigation of David Emami and  
23 the associated companies?

24 A. Yes, I have.

25 Q. And that would include Oak Grove Cinemas?

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1 A. Oak Grove Cinemas and Barrington Management, also  
2 touched tangentially on Barrington Ventures.

3 Q. Okay. And what was your role in the investigation?  
4 Was it the same as you just described when you described  
5 what you do?

6 A. Yes. I was the lead investigator. So the steps that  
7 I described would be the same steps that I did for that  
8 particular investigation.

9 Q. When did you begin your investigation?

10 A. I believe it was August 30th of 2012.

11 Q. Did your investigation involve interviewing  
12 Mr. Emami?

13 A. I did talk with Mr. Emami at -- so I had two initial  
14 conferences, I guess you could call it. The first one  
15 was with the manager of Oak Grove Cinemas. At the time  
16 Mr. Emami and Mrs. Emami were out of the country. So  
17 then I followed up with a second meeting when they came  
18 back in the country. I believe that was September 7th.  
19 It was early September.

20 Q. Was that the only time you spoke with Mr. Emami?

21 A. No. I had -- I spoke with him probably twice in  
22 person and I think two or three times by phone.

23 Q. So can you give us an approximate amount of time you  
24 spoke with him on each of those occasions?

25 A. In person -- I believe it was probably about two

Elegant - D

1 hours for the first initial conference in person. And I  
2 think it was a follow-up of about an hour, when we were  
3 discussing child labor. And then by the phone, I would  
4 say two or three conversations were probably between 10  
5 to 30 minutes, depending on the conversation.

6 Q. Okay. And you spoke with employees, also?

7 A. Yes, I did.

8 Q. About how many employees did you speak with?

9 A. I spoke with about 35 present and past employees.

10 Q. Okay. What language did you use when you spoke with  
11 Mr. Emami?

12 A. I spoke with him in English.

13 Q. Did you have any trouble understanding him?

14 A. No.

15 Q. And did he indicate to you that he had trouble  
16 understanding you?

17 A. When we talked, it was -- if he had any questions or  
18 any clarification, we would discuss, you know, "I didn't  
19 understand what exactly you meant by this," and we would  
20 discuss it more. So I believe that he understood just  
21 fine.

22 Q. All right. And when you spoke with the employees,  
23 what language did you use?

24 A. With some of the employees, I spoke English. With  
25 other employees, I spoke Spanish.

Elegant - D

1 Q. Are you fluent in Spanish?

2 A. I am.

3 Q. And during the course of your investigation, did you  
4 come into possession of any recordings?

5 A. Yes. Recordings were sent to me.

6 Q. Okay. Without talking about the content of the  
7 recordings or who may have submitted those recordings to  
8 you, can you tell us how you came into possession of  
9 them?

10 A. They were sent to my work e-mail account. They were  
11 attachments.

12 Q. Okay. And again, without identifying employees or  
13 discussing, you know, the content of the recordings, what  
14 did the recordings represent?

15 A. The recordings were a conversation that Mr. Emami was  
16 having at a meeting, I believe. He was talking with  
17 workers in English. There was some translation into  
18 Spanish.

19 Q. Was it -- I'm using the word plural, "recordings,"  
20 but was it just one meeting?

21 A. Yes, I believe so. It was many recordings because  
22 they were short, maybe six-minute snippets or parts that  
23 were -- it was sort of recorded in parts, if that makes  
24 sense.

25 Q. Okay. And when was the meeting held?

Elegant - D

1 A. That meeting was in mid September.

2 Q. When did you receive the recordings?

3 A. I received them in mid October.

4 Q. And was the person who gave you the recordings an  
5 employee of the defendant's?

6 A. Yes.

7 Q. And is it your understanding that the person was an  
8 employee at the time the recordings were made?

9 A. Yes.

10 Q. And was it your understanding that the person who  
11 made the recording was present at the meeting?

12 A. Yes.

13 Q. And was his presence known to Mr. Emami?

14 A. Yes.

15 Q. Did you listen to the recording?

16 A. I did.

17 Q. How many voices, if any, did you recognize?

18 A. I recognized one of the voices.

19 Q. And whose voice did you recognize?

20 A. Mr. Emami.

21 Q. And is there any doubt in your mind that the voice  
22 you heard on the recording was Mr. Emami?

23 A. No.

24 Q. And what language was Mr. Emami speaking?

25 A. He was speaking English.



Elegant - D

1 Q. Did you have any trouble understanding what he was  
2 saying?

3 A. So some of the recordings are a bit difficult to  
4 understand, so there were some where I had to listen a  
5 few times to make sure I understood. But I feel like  
6 after I listened, if I needed to more than once, that I  
7 did understand what he was saying.

8 Q. Do you recall signing a declaration concerning what  
9 you heard on the recordings?

10 A. Yes.

11 Q. And do you recall that in the declaration there were  
12 several sentences that you declare as being remarks of  
13 Mr. Emami?

14 A. Yeah.

15 Q. Did you paraphrase his remarks in the declaration or  
16 are they verbatim or did you quote them?

17 A. Those remarks are verbatim.

18 Q. And to the best of your recollection, are the  
19 remarks, as stated in your declaration, accurate quotes  
20 of what Mr. Emami was saying at the meeting?

21 A. Yes.

22 Q. Okay. In your declaration you state that on  
23 April 9th of this year you spoke to an employee of the  
24 defendant's. Do you know the name of the individual you  
25 spoke to?

Elegant - D

1 A. Yes.

2 Q. And do you know if that person is still an employee  
3 or is still an employee of the defendant or was on  
4 April 9th?

5 A. Yes.

6 Q. And was that conversation that you had with the  
7 person on April 9th of this year concerning events that  
8 occurred during the course of that individual's  
9 employment?

10 A. Yes.

11 Q. And what did that person tell you?

12 A. The person told me that they were concerned that they  
13 had heard that threats had been made against a  
14 complainant that initiated this process.

15 Q. Okay. And what kind of threat?

16 A. To -- what was said to me in Spanish was "golpear,"  
17 which is to beat.

18 Q. To beat?

19 A. Yes.

20 Q. As in to beat up?

21 A. Right, exactly.

22 MR. HUNT: Objection. I think she's leading.  
23 The answer was given, "to beat," and then counsel was  
24 leading.

25 THE COURT: Your objection is overruled.

Elegant - D

1           Go ahead.

2           MS. BRINKERHOFF: Pardon?

3           THE COURT: Go ahead.

4           MS. BRINKERHOFF: Okay.

5 BY MS. BRINKERHOFF: (continuing)

6 Q. So did you speak to anybody else about that threat?

7 A. Yes.

8 Q. And when did you speak -- who did you speak to about  
9 the threat?

10 A. I spoke with quite a few people about that threat:  
11 My supervisors, immediately after receiving it. I also  
12 talked with one of the employees who was identified as  
13 having heard that.

14 Q. And what did that person tell you?

15 A. So that person stated that he talked with Mr. Emami  
16 and that Mr. Emami asked who was the person who made the  
17 complaint. This individual said he didn't know. He then  
18 asked if it was -- and identified two particular workers,  
19 and the individual said he didn't know.

20           He also -- and then he said that he didn't -- he  
21 wanted to know who was trying to bring problems to him,  
22 he being Mr. Emami; and that if this person found out who  
23 made the complaint, to let him know, because he would  
24 send someone to -- to beat up this person. Again, this  
25 person used the word "golpear." I asked him if he had

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1 said the word in Spanish, and he said he made a motion  
2 like a fist.

3 Q. You're stating that Mr. Emami wanted to know who made  
4 the complaint. Are wage and hour investigations always  
5 initiated by complaints?

6 A. No, they are not. There are some that are initiated  
7 by complaints, and some are initiated as a directed  
8 investigation.

9 Q. So as far as you know, does Mr. Emami have any reason  
10 to believe that there was a complaint issued against him,  
11 from anything that you or your colleagues might have  
12 said?

13 A. We never disclose why we initiate an investigation.  
14 Somebody can guess that it's a complaint. We always say  
15 investigations are initiated either through a directed  
16 initiated investigation or through a complaint. We do  
17 not disclose what reason we are initiating an  
18 investigation. And the investigation itself, once  
19 initiated, is run the same way, so in that way we're  
20 trying to steer the conversation away from that.

21 I never said to Mr. Emami that there was a  
22 complaint. I would never do so.

23 Q. Okay. You stated in your declaration that the  
24 employees mentioned in your declaration are not willing  
25 to come forward at this time. What do you base that

Elegant - D

1 conclusion on?

2 A. Well, the employees are very afraid of losing their  
3 job. They said that.

4 MR. HUNT: Your Honor, this is just her  
5 characterizer, her subjective evaluation. It's a  
6 compound question because it involves all employees.  
7 We're not talking about just one person. She's just  
8 characterizing 35 people as all having the exact same  
9 emotion.

10 THE COURT: Your objection is overruled.  
11 Go ahead.

12 THE WITNESS: So I say that because they said,  
13 "I am afraid." So that's, you know -- the conversations  
14 I've had, that sentence has been said to me: "I'm  
15 afraid. I'm afraid I'm going to lose my job." So  
16 they're very reluctant to come forward.

17 BY MS. BRINKERHOFF: (continuing)

18 Q. You then go on in your declaration to state that the  
19 employees have assured you that they will testify in this  
20 matter. What would make them testify at some point?

21 A. Well, the employees that I've talked with are hoping  
22 that this will be resolved without the necessity to  
23 testify. They're hoping for a resolution. They're  
24 hoping to be able to keep their jobs as well. If it  
25 becomes necessary -- they have told me if down the road

Elegant - X

1 it becomes necessary, they are willing to testify if it  
2 cannot be resolved before then.

3 Q. Okay. And do you have an idea of how many employees  
4 have indicated that they would testify at a hearing?

5 A. So of the ones that I have talked to about this, I  
6 think about eight have indicated -- around eight have  
7 indicated that they are willing to come forward and  
8 testify.

9 MS. BRINKERHOFF: I have no more questions, Your  
10 Honor.

11 THE COURT: Cross-examine.

12

13 CROSS-EXAMINATION

14 BY MR. HUNT:

15 Q. Could you tell me who within your department decides  
16 whether to pursue an investigation? Is that you or  
17 somebody else within your department?

18 A. No, it's -- well, I get the information from my  
19 supervisor. I'm not sure if it's my direct supervisor or  
20 the supervisor above him who makes that decision, but I  
21 get the information from my direct supervisor.

22 Q. And have you completed your investigation in this  
23 matter?

24 A. At this point, at this date?

25 Q. Yes.

Elegant - X

1 A. So the investigation has been turned in. What that  
2 means is it's been given to my supervisor. So the  
3 investigative part has been concluded. The investigation  
4 is usually a two- or three-year period, which that ends  
5 when we first enter.

6 Q. You spoke with the manager of Oak Grove Cinemas?

7 A. That's correct.

8 Q. Who was that individual?

9 A. So his first name is Colin. His last name starts  
10 with an S. I honestly -- I don't want to guess at it.  
11 So it is in there. I can get that for you.

12 Q. Did he cooperate in your investigation?

13 A. Yes, he did.

14 Q. Did Mr. Emami and his wife cooperate in the  
15 investigation?

16 A. Yes.

17 Q. And is it -- apparently it is the hope of the  
18 employees, at least with whom you spoke, that they would  
19 like to see this matter resolved?

20 A. That's correct.

21 Q. Is that the position of the Department, if you know?

22 MS. BRINKERHOFF: I'm going to object.

23 THE COURT: Overruled.

24 Go ahead. Answer the question.

25 THE WITNESS: Yes.

Elegant - X

1 BY MR. HUNT: (continuing)

2 Q. You talked about recordings. And as I heard your  
3 testimony, I believe you said that they were in several  
4 recordings. Is that correct?

5 A. Right.

6 Q. They were all made by the same person?

7 A. Right.

8 Q. Do you know whether they were all made at the same  
9 time or whether they were made at different times?

10 A. The same time.

11 Q. How do you know that?

12 A. You can follow the conversation. There's even  
13 sometimes some overlap. So what I believe is that they  
14 were made into smaller amounts so they could be sent, if  
15 that makes sense.

16 Q. Well, that's your belief. You don't know for sure?

17 A. Well, when they overlap, it becomes very apparent  
18 that it's a continual conversation.

19 Q. And was Mr. Emami speaking with anyone?

20 A. Yes.

21 Q. And were there other voices that were on the tape?

22 A. So what you generally hear on the tape is Mr. Emami  
23 will speak for a long time, as though speaking to a  
24 group. And then somebody will translate what's being  
25 said from English into Spanish.



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1 Q. Were there any questions that came back from the  
2 employees?

3 A. No, I don't believe so.

4 Q. You don't know for sure?

5 A. I have to listen to the whole tape to be able to say  
6 for sure.

7 Q. And was the person who was doing the translating, was  
8 that person just summarizing his remarks or was he making  
9 a -- he or she making a verbatim translation of the  
10 remarks?

11 A. Summary.

12 Q. And the persons -- some of the persons that were  
13 listening to his remarks, do you know if any of them --  
14 whether their first language was English or not?

15 A. I don't know. I don't think so, but I don't know.

16 Q. Did you hear any words uttered in English by anyone  
17 other than Mr. Emami?

18 A. No.

19 Q. And this tape came into your possession when?

20 A. It was sent October 10th of 2012.

21 Q. And at any point have you provided the defendants or  
22 the defendants' counsel with a copy of the tape?

23 A. I have not.

24 Q. And did you provide this tape to somebody else at  
25 your department?

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1 A. Yes.

2 Q. How much time elapsed between October 10 and the time  
3 when you provided it to others?

4 A. Probably a few days. We actually had a difficulty in  
5 playing them. Our computer wouldn't play them. So it  
6 took a while. I was working with my supervisor to try to  
7 get it to a form where we could listen to it. So that  
8 happened probably within a few days after receiving it.  
9 And, you know, at that point my supervisor then had a  
10 copy of that as well.

11 Q. And once you learned what was on the tape, why was it  
12 that you didn't take action at that point?

13 A. So I informed my supervisor, and it went up the  
14 chain.

15 Q. And I'm not clear what the word, at some point during  
16 that tape -- well, do you remember what was said?

17 A. On the tape?

18 Q. Yes.

19 A. Yes.

20 Q. What do you recall?

21 A. Excuse me.

22 So the tape is quite long, but in general  
23 Mr. Emami is talking about the investigation. He's  
24 talking to the employees and encouraging them --

25 Q. I didn't want a summary. Do you remember the exact

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1 words that were uttered by Mr. Emami?

2 A. Not off the top --

3 Q. You'd need the tape?

4 A. -- of my head.

5 Q. There was -- in your declaration, there are some  
6 portions of -- there are some statements that are  
7 opposite bullet points. There are five bullet points in  
8 your declaration, in paragraph 10.

9 A. Correct.

10 Q. Were those -- those were selected items that you took  
11 from the tape?

12 A. That's correct.

13 Q. And in some instances did you, when you would -- when  
14 you would refer to a particular statement, did you delete  
15 portions of it? There seemed to be some dots between  
16 certain portions of statements.

17 A. When there are dots, it indicates that there are  
18 words there that are not included, that's correct.

19 Q. All right. Why didn't you include them?

20 A. So -- that decision was made by the solicitor's  
21 office.

22 Q. There are also some comments in the tape that I would  
23 characterize as editorial comments or characterizing  
24 comments about statements, such as in brackets, there's a  
25 comment, "intimidating" --

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1 A. Intimidating?

2 Q. I'm sorry, "imitating the government." Beg your  
3 pardon.

4 A. Correct.

5 Q. Now, did you put that phrase in there or did someone  
6 else?

7 A. That was done at the solicitor's office.

8 Q. And there are other phrases that were also added,  
9 correct, in brackets, "imitating worker"?

10 A. Correct.

11 Q. That was somebody's characterization of what was  
12 being said; is that correct?

13 A. Correct.

14 Q. So how long is the tape? Is it a total of 30  
15 minutes?

16 A. It's more than 30 minutes.

17 Q. Is it an hour?

18 A. I think it's around 50 minutes. I'm not -- I'm not  
19 positive about that.

20 Q. So would you agree with me that the -- the five items  
21 that are taken here were just selective bits and pieces  
22 of the tape?

23 A. That's correct.

24 Q. And were they -- were the pieces that were selected,  
25 were they selected to -- to show that Mr. Emami was

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1 misbehaving or saying something that wasn't appropriate?

2 A. They were selected by the solicitor's office.

3 Q. Do you know what --

4 A. But in the tape, those are words that he said, and  
5 those are things that were conveyed to workers.

6 Q. Do you know what was said by Mr. Emami before the  
7 tape began?

8 A. Before the tape began?

9 Q. Yes.

10 A. No.

11 Q. And you're confident that without exception, of the  
12 five -- or how many tapes were there?

13 A. There were about 10 recordings.

14 Q. And is it your testimony that without exception,  
15 there was never a break between any of the 10 or so  
16 recordings?

17 A. I don't believe so.

18 Q. But you're not certain?

19 A. I'm not a hundred percent certain, no.

20 Q. So what you put in your declaration, of course, you  
21 didn't hear that?

22 A. Excuse me?

23 Q. You didn't hear -- you personally weren't a party to  
24 these events?

25 A. That's correct.

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1 Q. These are tapes, and they were selectively quoted, or  
2 in some instances bits and pieces of a sentence were  
3 quoted, correct?

4 A. That's correct.

5 Q. And then there were characterizations that were added  
6 to some of the items that were quoted by the solicitor.

7 A. That's correct.

8 Q. And did -- so you -- the person who was translating  
9 was not translating all 50 minutes?

10 A. They were translating during the entire period;  
11 verbatim, no.

12 Q. And was there more than one translator?

13 A. No. It was one individual.

14 Q. Do you know who the translator was?

15 MS. BRINKERHOFF: Objection, Your Honor. That's  
16 informant's privilege.

17 MR. HUNT: I'm just asking if she knows who the  
18 translator -- I've not asked who it was. I've asked  
19 whether she knows who it is.

20 THE COURT: The objection is overruled.

21 Go ahead.

22 THE WITNESS: Yes.

23 BY MR. HUNT: (continuing)

24 Q. There is a statement in your declaration that -- that  
25 on or around April 9 you spoke to an individual, an

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1 employee, who reported to you that Mr. Emami continues to  
2 ask his workers if they are talking with you.

3 A. Yes, that's correct.

4 Q. Is that against the law, to ask an employee whether  
5 they're speaking with an investigator?

6 A. No.

7 Q. And then you gave some testimony about the word  
8 "beat" was used by this individual.

9 A. Yes.

10 Q. What specifically did the individual state to you?

11 A. The word -- the conversation was in Spanish, and the  
12 word that was used was "golpear."

13 Q. Which -- what does that mean?

14 A. It can mean to beat, to beat up, to hit.

15 Q. Well, which -- which was it? Or did the person  
16 explain? Did you follow up to find out whether Mr. Emami  
17 was going to hit the person or beat up the person or beat  
18 the person?

19 A. No. At the time I did not.

20 Q. And did you -- in your declaration, anyway, you  
21 didn't make any suggestion or statement that Mr. Emami  
22 was going to direct that someone else beat up the  
23 individual, correct?

24 A. No, I did not.

25 Q. So which was it? Did the person say -- use the word

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1 "beat" or "beat up"? Or did the person say that  
2 Mr. Emami had told -- or the individual had heard that  
3 Mr. Emami was going to direct that someone else would  
4 beat up the person?

5 A. That Mr. Emami was going to direct somebody -- he was  
6 going to send someone to do that.

7 Q. But you didn't mention that in your declaration?

8 A. I did not correctly clarify that, that's correct.

9 Q. So your declaration isn't accurate in that respect?

10 A. In that respect, it is not.

11 Q. You also testified that the employees that you  
12 interviewed are worried.

13 A. Yes.

14 Q. Now, did they use that word? Did they say -- did  
15 each of them say, "I'm worried"?

16 A. No. The word would be "preocupado," and that's not  
17 the word that they would use.

18 Usually it would be "Tengo miedo," "I'm afraid."  
19 Usually that's followed by things like "that I would lose  
20 my job."

21 Q. But you didn't put in your declaration that they were  
22 afraid or that they were afraid they would would lose  
23 their job, correct?

24 A. No, I did not. I was not quoting them directly.

25 Q. So the use of the word "worried" is just your



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1 characterization as what you heard from some of them?

2 A. Correct.

3 Q. And I gather you didn't hear it from all 35 -- from  
4 all of the persons that you interviewed?

5 A. I have not talked with all 35 individuals about  
6 whether or not they are afraid that they will keep their  
7 job.

8 Q. Did anyone that you spoke with use the word  
9 "worried"?

10 A. I am not sure.

11 Q. Now, did any -- any of the persons that you  
12 interviewed state that they were threatened?

13 A. That they were threatened?

14 Q. Yes. Did they use that word, by Mr. Emami?

15 A. Directly, no.

16 Q. It was more that they were telling you that they were  
17 worried or afraid, not that they had been directly  
18 threatened by Mr. Emami?

19 A. Threatened that they would lose their job? "If you  
20 talk to the government, you will not work for me," that's  
21 a direct threat.

22 Q. I want to know whether any of them said that they  
23 felt that they were threatened by Mr. Emami.

24 A. So Mr. Emami -- yes, they said that they were  
25 directly threatened by Mr. Emami that they would lose

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1 their job.

2 Q. Okay. Somebody said that they were directly  
3 threatened? They used those words, they were directly  
4 threatened that they would lose their jobs?

5 A. They would say, "He told me if I talked to them and  
6 told them that I worked additional hours, I would lose my  
7 job. He told me if I received money, that I would  
8 not -- I would not have a job." That would be what they  
9 would say. They wouldn't use the word "threatened." It  
10 would be like "He told me."

11 Q. They didn't all say that, all of the --

12 A. Every single person did not say that, no. Some of  
13 the individuals said that, yes.

14 Q. Did some of the people speak -- make favorable  
15 remarks about Mr. Emami?

16 A. No.

17 Q. Did -- did anyone suggest -- so no one said anything  
18 positive about him, that you interviewed?

19 A. No.

20 Q. Did any of them -- you don't have any evidence that  
21 any of them were in fact beat, do you?

22 A. No.

23 Q. Do you have any evidence that any of them were  
24 terminated because they had been interviewed by you?

25 A. No.

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1 Q. Did you speak with the person that made the initial  
2 complaint?

3 A. Yes.

4 Q. And --

5 MS. BRINKERHOFF: Objection, Your Honor.

6 THE COURT: Overruled.

7 BY MR. HUNT: (continuing)

8 Q. More than once, did you speak with that individual?

9 A. Yes.

10 Q. And was that individual -- were these comments about  
11 "beat" or "beat up" directed at that individual or  
12 someone else, if you know?

13 A. To someone else.

14 Q. Well, the statement was made to somebody else?

15 A. The statement was made to someone else.

16 Q. And what was -- and was the statement made that the  
17 person who was hearing it would be beat up? Or was the  
18 statement that some other person would be beat or beat  
19 up?

20 A. So the statement, as I said before, was to an  
21 individual; and if that person knew who the complainant  
22 was, then the complainant would be beaten up.

23 Q. You mentioned -- well, did you ever question  
24 Mr. Emami about these matters?

25 A. About which matters?

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1 Q. The ones you just testified to.

2 A. No, I did not.

3 Q. Why not?

4 A. At that point he was represented by an attorney. In  
5 our investigation, we'll work directly with the owner or  
6 manager. If somebody is represented by an attorney, then  
7 it is expected that we would go through an attorney.

8 Q. Did you ever go through an attorney to interview him  
9 regarding the --

10 A. Well, at that point my case had been turned in. So  
11 at that point I notified our attorneys of the matter. So  
12 at that point I was also no longer speaking with the  
13 attorneys.

14 Q. How many individuals that you interviewed said that  
15 David, their boss, said directly to them that if they  
16 were paid money, they would lose their job, if any?

17 A. Directly, I think three or four.

18 Q. And those persons are still working?

19 A. Some of them.

20 Q. Do you know whether some of them have voluntarily  
21 quit?

22 A. Some of them have left.

23 Q. And you don't know why?

24 A. I've been told for some, reasons why some of them  
25 have left, yes. Some of them have found jobs in other

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1 places.

2 Q. Do you know whether they've found higher-paying jobs?

3 A. I did not ask.

4 Q. There was a -- I think there was mention in your  
5 testimony about a clenched fist or a -- do you know  
6 what -- do you know anything more about that, other than  
7 somebody reported that Mr. Emami had his fist clenched?

8 A. So the sentence was -- that was reported to me was  
9 that if Mr. Emami found out who made the complaint, he  
10 would send somebody, and his fist was raised. So that's  
11 what --

12 Q. Do you know whether David, the boss, would ever put  
13 his fist on his hand just to make a point, saying, "We've  
14 got to get this done by noon" or "We've got to get this  
15 work done"?

16 A. I don't know.

17 Q. How many persons told you -- employees said they  
18 feared losing their jobs?

19 A. I believe I said about three to four.

20 Q. And did you interpret, then -- I'll withdraw that.

21 MR. HUNT: That's all I have, Your Honor.

22 THE COURT: Thank you.

23 Do you have any redirect?

24 MS. BRINKERHOFF: I do.

25

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REDIRECT EXAMINATION

BY MS. BRINKERHOFF:

Q. First of all, opposing counsel, as they characterized it, the editorial bracketed material, do you agree that those phrases were appropriately contextual?

A. I do.

Q. And how do you know that?

A. As he's talking, he changes his voice. So let's say he's talking like this. And then he'll talk -- and then he'll -- he'll change the tone of his voice to show that he's taking on another character.

Q. You've testified that Mr. Emami continues to ask his employees if they are talking to you.

A. Yes.

Q. So is it your understanding that those questions by Mr. Emami are asked, you know, during coffee breaks or at the water fountain, just casual questions?

A. No.

Q. How -- what is your understanding of the tenor of those questions?

A. Well, the questions are usually, are they talking to me, and often tells them what they shouldn't say. "Tell them you only work 40 hours a week." So it's not just, "Hey, is the investigation still ongoing?" It's more of an instructive.

Elegant - ReX

1 Q. Okay. And is it your understanding that the  
2 employees are feeling kind of badgered by Mr. Emami?

3 MR. HUNT: Objection, Your Honor.

4 THE COURT: Overruled.

5 THE WITNESS: Yes.

6 BY MS. BRINKERHOFF: (continuing)

7 Q. Okay. So I recall from your testimony, from your  
8 testimony this morning, you had two conversations about  
9 somebody -- Mr. Emami beating somebody up. Is that  
10 correct?

11 A. Yes.

12 Q. And the second conversation, which was the more  
13 recent conversation, that was where you found out that he  
14 was going to send somebody.

15 A. Yes.

16 Q. And that conversation was held after you signed your  
17 declaration; is that correct?

18 A. That's correct.

19 MS. BRINKERHOFF: I have no further questions.

20 THE COURT: You can step down.

21

22 RECROSS-EXAMINATION

23 BY MR. HUNT:

24 Q. Do you have a file on this matter, an investigative  
25 file?

Elegant - ReX

1 A. Yes.

2 Q. Where is it? Do you have it or does somebody else  
3 have it?

4 A. It's been given to the solicitor's office.

5 THE COURT: You can step down.

6 THE WITNESS: Thank you.

7 THE COURT: Do you have anything else?

8 MS. BRINKERHOFF: I was going to talk about the  
9 preliminary injunction analysis.

10 THE COURT: Sure. Go ahead.

11 MS. BRINKERHOFF: I think the Department has met  
12 its burden to show that a preliminary injunction is  
13 warranted here. First, the Department is likely to  
14 succeed on the merits because it's got evidentiary proof  
15 that Mr. Emami has made threatening remarks to his  
16 employees. We have the tape-recordings that, you know,  
17 the provenance of those were testified to by what I feel  
18 is a credible reliable witness, Ms. Elegant, who also  
19 testified to the remarks that employees made to her about  
20 the physical threats.

21 And those employees stuck their necks out to talk  
22 to her about these things because they don't know what  
23 Mr. Emami might do or what might happen to them or  
24 whether the Department can protect them or not. So the  
25 fact that they took on that risk, to me, makes them even



1 more credible.

2 And it doesn't really matter how many employees  
3 Mr. Emami might have threatened or tried to coerce or  
4 coach, any of those things. Even just one person is a  
5 violation of the Fair Labor Standards Act.

6 Second, unless the Court immediately restrains  
7 Mr. Emami from making the threats against his employees  
8 and continuing to make threats against them, the  
9 Department is going to suffer irreparable harm, because  
10 it will be constrained in its future investigations.  
11 Employers will think that they can get away with  
12 retaliating against their employees or threatening their  
13 employees, because they'll know that nothing will happen  
14 to them. And employees will be reluctant to come forward  
15 to the Department because they have no guarantee that  
16 they're going to be protected.

17 Then the balance of equities tilts in the  
18 Department's favor. As we said in our brief and  
19 defendants even admitted, the defendants really have no  
20 legitimate interest in threatening their employees.  
21 Their interest is the self-interest, and it's to cow  
22 their employees into not cooperating with the Secretary's  
23 investigation.

24 But in contrast, the Secretary's interest in the  
25 defendant is the defendant's immediate compliance with

1 the Fair Labor Standards Act and also with giving the  
2 employees assurance that they are going to be protected  
3 by their government.

4 So the differences in the parties' interest is  
5 very stark, and there's just no doubt that it weighs  
6 heavily in the Secretary's favor.

7 Fourth, an injunction will be in the public  
8 interest. And the relief that we seek and sought was  
9 designed to send a message to employers that they are not  
10 going to be -- they will be held accountable for any acts  
11 of retaliation against employees who engage in protected  
12 activities under the FLSA. And the public interest will  
13 not be served if Mr. Emami is not restrained by this  
14 Court from his ongoing retaliatory conduct and threats.

15 And I'd like to mention that there is a line of  
16 cases that state -- that hold that when a statute  
17 provides for equitable relief, that we really don't have  
18 to go through that four-stage or four-step analysis that  
19 I just went through. But we chose to do that. All we  
20 have to do, under those holdings, is show that the  
21 defendant made -- did something that was in violation of  
22 the statute, which we have done. But we've decided we  
23 ought to go through with this analysis, because we just  
24 wanted to show that either way we would prevail.

25 So in closing, we just want to emphasize that our

1 goal here, our mission is twofold. First of all, we want  
2 to protect the employees of Mr. Emami from any sort of  
3 coercion regarding the wage and hour investigation and  
4 the Department's enforcement action. And, second, we  
5 want to send a very clear signal to employers who are  
6 within the jurisdiction of this Court that they are going  
7 to be held accountable if they engage in the kind of  
8 conduct that Mr. Emami engaged in and that they cannot  
9 interfere with the Secretary's mandate to protect  
10 employees.

11 Thank you.

12 THE COURT: Thank you.

13 Mr. Hunt.

14 MR. HUNT: Your Honor, first -- well, we in our  
15 papers raised a number of procedural issues and due  
16 process issues and First Amendment issues, and I'm not  
17 going to go over all of them, but it's important to note  
18 that the defendants to this day have still not been  
19 served. Their lawyers have been sent some of the papers,  
20 but not all of the papers.

21 The temporary restraining order --

22 THE COURT: I'm sorry. When you say they haven't  
23 been served, they haven't been served a copy of the  
24 Complaint?

25 MR. HUNT: They haven't been served a copy of

1 anything.

2 THE COURT: Okay.

3 MR. HUNT: Not the Complaint or summons. They  
4 simply haven't been served, which is a rather fundamental  
5 procedural event that should have occurred in this case  
6 and did not.

7 In the temporary restraining order, in our view  
8 it didn't assert specific facts that would warrant having  
9 granted the order. It cited conclusions and statements  
10 from a declaration, but there were no declarations from  
11 any of the employees who had firsthand knowledge of the  
12 events.

13 Counsel for the defendants didn't really have an  
14 opportunity to appear and argue these points at the  
15 temporary restraining order because as far as we know,  
16 there was no hearing. If I'm wrong on that, correct me,  
17 Your Honor, but we're not aware of any hearing or  
18 opportunity to be heard. We learned of the temporary  
19 restraining order being entered the day after Your Honor  
20 signed it, because no attorney had appeared on behalf of  
21 Mr. Emami.

22 Part of the problem with the temporary  
23 restraining order is that the Department -- it seemed to  
24 go from the investigator to the solicitor. And somewhere  
25 along the line, things just sort of moved along without

1 reflection on complying with the rules. And then after  
2 the order was entered, somehow a contact was made with  
3 the Bloomberg BNA service, and this got reported in  
4 the -- essentially in the national press. And the report  
5 included comments from a spokesperson from the  
6 Department, stating that the Department obtained a  
7 tape-recording of a meeting in which Emami threatened to  
8 fire his workers if they cooperated with wage and hour  
9 investigators. And then it went on to say that a worker  
10 also reported a threat of physical violence was made at  
11 another time.

12 So all of this is reported in the press. The  
13 defendants don't have an opportunity to conduct any  
14 discovery or appear through counsel. And it's hard to  
15 sort of unring that bell.

16 We believe that the order that was issued, the  
17 temporary restraining order, and what the Department is  
18 now seeking in the form of a preliminary injunction has a  
19 number of defects. We think it's overly broad. It's  
20 vague in some respects. It makes -- it gives the  
21 writer -- would presumably give the Department the right  
22 to seek contempt proceedings against Mr. Emami if the  
23 Department felt that Mr. Emami believed that -- that  
24 somebody was going to testify or participate or cooperate  
25 in the investigation.

1           So those words are not in the statute. And it  
2           would give the Department a -- quite a range of latitude  
3           to seek contempt if they concluded that in their minds  
4           there was a belief by Mr. Emami that somebody was doing  
5           something.

6           The --

7           THE COURT: I'm sorry. I lost you on that last  
8           point. What you're -- I mean, in every restraining order  
9           an individual is restrained from doing something. And of  
10          course if that individual does something they're not  
11          supposed to be doing, the other side gets to bring that  
12          matter before the Court; and the Court will decide  
13          whether or not somebody is in violation of the order. I  
14          don't see the problem with that.

15          MR. HUNT: Well, the wording, though, wasn't --  
16          it was dependent upon not the individual, Mr. Emami,  
17          doing these things, but a conclusion by the Department  
18          that he may have believed that somebody was doing  
19          something. It's sort of a fine point. But the wording  
20          "believe" isn't in the statute.

21          THE COURT: That's fine, and I don't -- I don't  
22          disagree with you that the order itself can use some  
23          work.

24          Go ahead.

25          MR. HUNT: And on that score, counsel -- general

1 business counsel for the defendants here attempted to  
2 talk about the order or learn what the form of order was  
3 going to be in advance and got nowhere in that respect.  
4 There wasn't any dialogue or communication.

5 So we have eight months of time passed when we  
6 think that -- that to the defendants' perception, anyway,  
7 they're cooperating in the investigation, they're hoping  
8 for a resolution, and then -- then this -- they're  
9 notified that there's going to be a TRO complaint sought  
10 and a complaint filed, but they're not told exactly when  
11 it's going to happen. And then they ultimately learn  
12 that there's not going to be a hearing and that there's  
13 not going to be sharing of papers that the Department  
14 intended to file with the counsel for the defendant.

15 So needless to say, you -- you were presented  
16 with one side of the -- one version of facts, not both  
17 sides.

18 THE COURT: Yeah, that doesn't trouble me so much  
19 either. That's the nature of temporary restraining  
20 orders.

21 But I will say I am troubled that there were  
22 conversations going on for months, and this was not  
23 specifically discussed with you, with opposing counsel.  
24 It should have been. They should have called you and  
25 said, "We have a problem with your client. This is what

1 it is. You need to talk to your client and fix this  
2 problem. If it's happening, you need to fix it." That  
3 conversation didn't happen, and I think it should have.

4 MR. HUNT: And it's happened, but in the form of  
5 formal papers. But yes, we agree, Your Honor, that if  
6 those issues had been brought, lawyers for the defendants  
7 would say, "Do not engage in any behavior that even  
8 approaches what has been reported to us. There's no  
9 upside for it, to you, in doing that."

10 And that's our position today. We don't -- we  
11 don't want our client to be in trouble. We don't want  
12 contempt proceedings to be brought. But we don't think a  
13 preliminary injunction is the way to -- is necessary,  
14 given what the procedural background is leading up to  
15 this matter.

16 There was a -- there was a tolling agreement that  
17 was discussed. And if you read the tolling agreement, it  
18 has some language that said that the -- ultimately the  
19 Department may or the Secretary may bring legal  
20 proceedings. And in exchange for that, the Secretary  
21 agrees to withhold immediate filing of any legal  
22 proceedings. And then buried in another paragraph, if  
23 you read the fine print, there's mention of a 30-day  
24 notice. But now they're contending that the fine print,  
25 we should have noted that it just related to claims for



1 wages and penalties and didn't apply to efforts to obtain  
2 a temporary restraining order.

3 Back then, when they're discussing back and forth  
4 this tolling agreement, it would have been nice to hear  
5 about this tape that they had. The tolling agreement  
6 conversation occurred I think in February of this year.  
7 The tape was in their possession since October of 2012.

8 THE COURT: And again, on that issue I understand  
9 what happened. They have this tape. They're concerned  
10 about it. They're hanging on to it. And then they get  
11 report that there's threats of violence. That changes  
12 everything. Not to excuse them for not communicating  
13 with you about it, but it changes everything. And I  
14 actually agree with them that the tolling agreement was  
15 not designed for and did not capture this event. It  
16 wasn't what it was for.

17 Go ahead.

18 MR. HUNT: Well, and we agree that the law  
19 provides that threats are unlawful. But the issue is  
20 whether they have proof of that. And what we have in the  
21 declaration is secondhand, thirdhand information,  
22 selective quotes, omitted -- statements taken out of  
23 context, statements characterized. We don't have -- we  
24 don't know what the translation was. We don't know  
25 whether the persons that were hearing these comments even

1 understood them or whether there was a fair  
2 characterization of the comments.

3 In our view, reliance upon an illegally recorded  
4 conversation is -- doesn't weigh in favor of the  
5 Government. They may cite to some authorities that  
6 suggest that they can use it. But the fact that they  
7 held onto it and decided when they were going to use it  
8 doesn't assist them in obtaining a preliminary injunction  
9 here.

10 It's our position that there is no emergency here  
11 because there hasn't been any report that I'm aware of  
12 since April, even crediting the investigator's  
13 declaration on that. Time has passed. There hasn't been  
14 any emergency that would warrant a preliminary  
15 injunction. And there's no -- there's no proof that  
16 there's going to be some harm occurring in the future.

17 On the -- just on the basic prongs of the --  
18 needed for a preliminary injunction, it's our position  
19 that the Department cannot show irreparable harm because  
20 eight months have elapsed, and even from April another  
21 three weeks or more.

22 They can't show that they're going to succeed on  
23 the merits because they're relying solely upon the  
24 Elegant declaration. We don't know whether the  
25 employees -- there's a subset of employees, some of whom

1 may never have expressed that they were going to file a  
2 complaint or wish to testify. We don't know -- we can't  
3 sort out that issue.

4 This business about the employees being worried  
5 is a characterization, as admitted in the testimony  
6 today. And so the basis upon which they're seeking the  
7 preliminary injunction today in our view is vague,  
8 conclusory, and not based upon any -- any direct  
9 evidence.

10 With regard to the balancing of the hardship  
11 issue, if a preliminary injunction is ordered, then  
12 Mr. Emami is going to be at risk for being cited for  
13 contempt. He really can't speak to his employees unless  
14 he reads the script that is part of the temporary  
15 restraining order; and it's our position that that  
16 compelled statement shouldn't be required of him, that he  
17 ought to be able to run his business and not be looking  
18 over his shoulder, wondering if he's saying something  
19 that will be claimed to have been improper later on.

20 We think that the persons that were being  
21 interviewed had a right to know whether or not they could  
22 speak not only with our client, but with the  
23 investigator. And because of the nature of the  
24 investigation and somebody from the federal government  
25 quizzing them, it would be, in our view, appropriate to

1 have language that states that a person can decline to  
2 talk or can talk with both the Department and also with  
3 the defendants.

4 We note that Your Honor did change their  
5 temporary restraining order in one respect; namely, that  
6 you added that defendants' attorneys could talk directly  
7 with the employees, even though the defendants could not,  
8 about the nature of the investigation. But that, to us,  
9 creates ethical issues under the Oregon bar rules, and we  
10 would have concern that we were potentially violating  
11 ORCP 4.2.

12 We believe the order is overly broad, but I don't  
13 need to speak to that at this time, Your Honor. If Your  
14 Honor is going to enter some form of order, then we have  
15 some ideas about how it should be phrased; and we would  
16 either be prepared to discuss those directly with the  
17 Court today or with counsel.

18 THE COURT: By the way, have you talked to your  
19 client about this problem and the allegations set forth  
20 in the request for a temporary restraining order and  
21 request for preliminary injunction?

22 MR. HUNT: Yes.

23 THE COURT: And have you told your client that he  
24 has to comply with the FLSA and its requirements of  
25 non-retaliation; and if not, that he's in big trouble?

1 MR. HUNT: Yes.

2 THE COURT: You've had that conversation?

3 MR. HUNT: Yes.

4 THE COURT: Thank you.

5 What do you want to tell me?

6 MS. BRINKERHOFF: Well, first of all, I want to  
7 clarify something that actually just occurred to me while  
8 sitting here.

9 I actually had a conversation with Andrew Schpak  
10 of your law firm back in February. I did tell him at  
11 that time that we had evidence that his -- that his  
12 client was, you know, retaliating or threatening his  
13 employees. So it's not like that was not disclosed at an  
14 earlier date, because it was.

15 THE COURT: And actually, I wasn't even concerned  
16 about that. It's at the point you're making a decision  
17 that you're going to go seek a temporary restraining  
18 order. As I understand it, the triggering event was the  
19 April 9 -- when you learned about this conversation on or  
20 about April the 9th.

21 MS. BRINKERHOFF: Right.

22 THE COURT: You're professionals. You call the  
23 other side and you say, "We've got a problem. This is  
24 how we're going to deal with it." And you didn't do  
25 that.

1 MS. BRINKERHOFF: And part of that is because we  
2 wanted to make an impression, not just -- and this kind  
3 of goes to the Secretary's mandate. We want to make an  
4 impression not just on Mr. Emami, but on the employment  
5 community at large that, you know, when you do something,  
6 the Department of Labor isn't going to sit back and just  
7 twiddle its thumbs and let you get away with it.  
8 Something serious is going to happen to you, which is  
9 what we tried to do in this case.

10 THE COURT: What does that have to do with  
11 letting the lawyer on the other side know? Nothing,  
12 right? You let the other side know. That's how we live  
13 here. We let the other side -- we communicate with each  
14 other about what's going on because you're professionals.

15 MS. BRINKERHOFF: Right, yes.

16 THE COURT: And I don't care if the communication  
17 was "Look, we got a message that your guy was threatening  
18 physical harm. We're going after a TRO." I'm okay with  
19 that. But you call them and let them know this is what  
20 happened. And in the meantime, that puts them in a  
21 position where they go talk to their client and say, "If  
22 you did this, you've got to knock it off." Because  
23 ultimately what we want is the behavior stopped.

24 MS. BRINKERHOFF: Yes.

25 THE COURT: And if it's going on, the behavior

1 doesn't stop between April the 9th and to the time you  
2 get a TRO.

3 MS. BRINKERHOFF: I have a note to myself here  
4 that we notified defendants' counsel, which may have been  
5 Mr. Wagner, who is the business counsel for the  
6 defendants, on April 26th that we had a problem.

7 So that was not three or four weeks. That was  
8 whatever, 10 days or something, or 15 days. It wasn't  
9 quite as bad as --

10 THE COURT: What did you tell him?

11 MS. BRINKERHOFF: I don't remember.

12 THE COURT: Okay. Go ahead.

13 MS. BRINKERHOFF: So we understand that at some  
14 point we are going to have to turn these tapes -- you  
15 know, we're going to have to disclose the tapes. We just  
16 did not want to do it up until this point, because we  
17 wanted to make sure that Mr. Emami wasn't going to use  
18 those tapes to threaten his employees even further. So  
19 we were waiting for some sort of injunction from the  
20 Court to make sure that they would -- that their rights  
21 would be protected, as much as they could be.

22 And then I also just want to point out that I  
23 don't think that we have heard anything from defendants  
24 that they have actually denied making any sort of threats  
25 or that they denied making the statements in the

1 declaration.

2 And then finally, I just want to say that we are  
3 willing to, you know, listen to the Court or your  
4 thoughts on what the -- what the statement should be that  
5 Mr. Emami reads or the wording of the injunction. We  
6 just want to make sure that his employees are protected.

7 MR. HARNDEN: If I could add one comment -- it's  
8 a little dangerous for me to stand up at the end, Your  
9 Honor. But the point is they don't even give the  
10 attorneys the tape to say, "This is what was going on."  
11 The witness said the only person on the tape was  
12 Mr. Emami. So to say, "Well, we didn't want to get  
13 anyone in trouble" I think misses the point. They didn't  
14 give us anything, including what common sense would have  
15 told them to give us.

16 And then to come in without service on our client  
17 and say, "We want an injunction," without having done any  
18 of this seems a major stretch. And this is not the time  
19 for the Department to say, "Oh, we want to make a big  
20 statement to the employers of Oregon." This is a case  
21 about Mr. Emami.

22 It is not fair to not serve someone, to not give  
23 their counsel the tapes that they have had for months,  
24 and then to come in and ask for an injunction. I think  
25 it's just grossly unfair to any defendant.



1 THE COURT: Thank you.

2 I'm going to step off the bench for a few  
3 minutes. There are some notes I want to take down, and  
4 then I will be back. I will be back in 10 minutes.

5 (A recess is then taken.)

6 THE CLERK: Remain seated. Come to order.

7 THE COURT: I have reviewed the four parts under  
8 the *Winter* case in determining whether or not a  
9 preliminary injunction should order -- should issue. And  
10 in this case the first thing I looked at is whether or  
11 not the plaintiffs have proven that they are likely to  
12 succeed on the merits, and I find that they have proven  
13 that. I'm convinced that the tape shows that the  
14 defendant made remarks and later made threatening remarks  
15 to physical safety. He's made remarks that were intended  
16 to intimidate his workers and the complainants in this  
17 case, even though he doesn't know exactly who they are.

18 Secondly, I'm also convinced that the plaintiffs  
19 have shown that there is a likelihood of irreparable harm  
20 in this case. The workers, as they suggest, need to know  
21 that they are protected. The behavior needs to stop.  
22 And, therefore, they have shown that one.

23 There also is the question on the balance of the  
24 equities that also favors the plaintiffs in this case,  
25 and I also believe an injunction is in the public

1 interest. I am therefore ordering that a preliminary  
2 injunction should issue in this case.

3 I am not convinced that the way it was crafted as  
4 part of the temporary restraining order is the  
5 appropriate language or format for us as we go forward  
6 with the preliminary injunction.

7 What I want to have happen is I want there to be  
8 a draft of the preliminary injunction order which adopts  
9 the language of the Fair Labor Standards Act. And I  
10 suggest that it be made in the form of a poster that can  
11 be posted in the workplace and that a copy be served on  
12 Mr. Emami by defense counsel. They can review that with  
13 him. Although that won't be part of the order, I'm sure  
14 that they will take care of that.

15 I don't know how big the workplace is. I don't  
16 know how many posters ought to be posted, and I don't  
17 know the specific language, other than it should  
18 generically say the Fair Labor Standards Act prohibits  
19 retaliation. Then you can look at the specific language  
20 that's used in the Fair Labor Standards Act that  
21 basically tells the defendant that he needs to obey the  
22 law.

23 I expect you two -- that is, the plaintiffs and  
24 the defendants -- to be able to work that language out  
25 and also to be able to work out how many and how big the

1 posters ought to be and where they ought to be posted.

2 Questions from plaintiff?

3 MR. BROWN: I think we understand the Court's --  
4 we'll work to draft the language.

5 THE COURT: Thank you.

6 Questions from defense?

7 MR. HUNT: No, Your Honor. We'll work with them  
8 to come up with language that reflects the statute.

9 THE COURT: Okay.

10 MS. BRINKERHOFF: I do have a question.

11 So what we are going to draft will replace that  
12 one section in the TRO, and the other provisions will  
13 stand as they've been drafted?

14 THE COURT: No. The TRO is over as of today. It  
15 dissolves because I'm issuing a preliminary injunction.  
16 The preliminary injunction says you win. Draft a poster  
17 that's consistent with the requirements of the Fair Labor  
18 Standards Act, and that's what will be posted throughout  
19 the workplace or places. I don't know. Again, I'm not  
20 familiar with what exactly that encompasses.

21 But the portions, for example, that were  
22 requiring the defendant to read to his workforce what's  
23 in that, I'm not requiring him to do that. I'm requiring  
24 him to put up the posters. They can can be in Spanish  
25 and in English and should be, because I understand the

1 workforce is -- at least many of them are Spanish  
2 speaking. So it should be in both languages.

3 MR. BROWN: Your Honor, what about the provision  
4 in the TRO that prohibited Mr. Emami from talking with  
5 his workers directly?

6 THE COURT: I mean, he's got to be able to talk  
7 to his workers to conduct his business, I assume.

8 MS. BRINKERHOFF: Right, but the provision -- I'm  
9 sorry. Go ahead.

10 MR. BROWN: The provision just spoke to  
11 prohibiting him from talking to his workers, except  
12 through counsel and counsel's employees, about the  
13 substance of the investigation itself.

14 THE COURT: Again, you can draft language that  
15 reflects the spirit of the Fair Labor Standards Act.  
16 What you're trying to make sure is he's not trying to  
17 intimidate them, not trying to in some way prohibit them  
18 from pursuing their rights under the Fair Labor Standards  
19 Act. To the extent that you want to put language that  
20 reflects that in the poster, I'm okay with that.

21 So he can't do anything that interferes with  
22 their rights and ability to pursue their claims under the  
23 Fair Labor Standards Act.

24 Thank you.

25 MR. HARNDEN: Thank you, Your Honor.

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MR. BROWN: Thank you.

THE COURT: All right. Thank you.

(Proceedings concluded.)

--oOo--

I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-titled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

*/s/ Nancy M. Walker*

*5-22-13*

\_\_\_\_\_  
NANCY M. WALKER, CSR, RMR, CRR  
Official Court Reporter  
Oregon CSR No. 90-0091

\_\_\_\_\_  
DATE

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